Supreme Court, U.S.
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No.____

IN THE

Supreme Court of the United States

October Term, 1994

BEVERLY LESNICK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY S. LESNICK,
Petitioner,

v.

HOLLINGSWORTH & VOSE COMPANY,
Defendant-Respondent,

and

LORILLARD, INC.,
Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the court of appeals err in affirming dismissal, for lack of personal jurisdiction in Maryland, of a defendant Massachusetts corporation that manufactured an asbestos-containing component part of an injury-causing cigarette filter, when: (1) the defendant actively participated in design of the filter, owned the patent on the filter jointly with the cigarette manufacturer, sold the filter component it made exclusively to the cigarette manufacturer, supplied all of the manufacturer's needs for the component, knew that the manufacturer planned national advertising and distribution, and derived direct financial benefit from each sale of a finished cigarette; (2) the cigarette's distributor sold ten billion cigarettes nationally, including millions in Maryland; (3) plaintiff's decedent purchased hundreds of packs of the cigarettes in Maryland; and (4) the court found that the defendant placed the component in the stream of commerce and engaged in "additional conduct" as defined by the plurality in *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County,* 480 U.S. 102 (1987), but held that exercise of personal jurisdiction in Maryland would deprive the defendant of due process of law because there was no showing that the manufacturer's "additional conduct" was specifically directed toward Maryland?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated September 19, 1994, is reported as follows: *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, *rehearing denied* (4th Cir. 1994). The memorandum and order of the United States District Court for the District of Maryland, dated April 14, 1993, is unreported and unpublished. Both are included in the Appendix hereto.

STATEMENT OF JURISDICTION

Petitioner seeks grant of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit dated September 19, 1994, which affirmed the dismissal of

defendant Hollingsworth & Vose Co. for lack of personal jurisdiction. By order dated October 18, 1994, the court denied a Petition for Rehearing with Suggestion for Rehearing In Banc. This Court has jurisdiction to review the circuit court's judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Maryland Courts and Judicial Proceedings Code § 6-103(b)(4) provides in pertinent part:

> A court may exercise personal jurisdiction over a person, who directly or by an agent: . . . [C]auses tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State; . . .

STATEMENT OF THE CASE

Petitioner, Beverly Lesnick, seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the dismissal of defendant Hollingsworth & Vose Company ("H&V") for lack of personal jurisdiction. Mrs. Lesnick instituted this action on December 4, 1991, with the filing of a complaint seeking damages for personal injuries to her late husband, Stanley Lesnick. Jurisdiction in the district court was

founded on 28 U.S.C. §1332(a), as there existed complete diversity of citizenship among the parties and the amount in controversy exceeded $50,000.00. The complaint alleged that Mr. Lesnick smoked Kent cigarettes in the early nineteen fifties, when Kent's filters contained asbestos. As a result of that asbestos exposure, Mr. Lesnick developed mesothelioma, a cancer that caused his death on November 21, 1989.

At the time of Mr. Lesnick's death, both he and his widow, plaintiff herein, were residents of Baltimore County, Maryland. Mrs. Lesnick filed suit in the United States District Court for the District of Maryland, naming as defendants Lorillard, Inc. ("Lorillard"), and H&V. The complaint alleged that Lorillard, a New York corporation, whose principal place of business was in New York, manufactured and distributed the Kent cigarettes. A subsidiary of H&V, a corporation that was incorporated and maintained its principal place of business in Massachusetts, manufactured and sold to Lorillard the asbestos-containing filter material that Lorillard integrated into its cigarettes.

After Mrs. Lesnick filed an amended complaint, H&V moved to dismiss for lack of personal jurisdiction. H&V's dismissal motion was accompanied by an affidavit signed by Paul Walker, Director of Regulatory Affairs for H&V. Mr. Walker stated that a wholly-owned subsidiary of H&V, H&V Specialties Co., Inc. ("Specialties"), was incorporated in February 1952, and merged into H&V in 1957. In February 1952, after its incorporation, Specialties contracted with Lorillard to manufacture filter media for use in Kent's filters. Specialties manufactured the filter media in its plant in Massachusetts from early 1952 until May 1956. It shipped the filter media to Lorillard's manufacturing sites in New Jersey and Kentucky. Mr. Walker swore that Specialties did not design the filter media "for the market in Maryland," had no customers in Maryland, and did not establish channels for advertising, distributing its product, or servicing customers in Maryland.

Mrs. Lesnick's response included as exhibits various documents in support of her position that the court had personal jurisdiction over H&V. Those documents included the February 14, 1952, contract between Specialties and Lorillard referenced in Mr. Walker's affidavit (the "Agreement"). That Agreement

shows that Specialties and Lorillard acted together to research and develop the asbestos-containing filter media and jointly owned patents subsequently issued for the filter. They bound themselves to share all knowledge they might acquire with regard to improvements in the filtering of tobacco products. They agreed to share equally all costs incurred from September 1, 1950, in developing the filter material and in establishing the facilities and equipment necessary for production of the filter media. The parties jointly owned the equipment thus purchased. Specialties agreed that, for at least five years, it would sell its filter material only to Lorillard, and would supply all of Lorillard's needs for the material. Lorillard agreed to indemnify Specialties for all damages, costs, expenses and liabilities arising from any harmful effects of Lorillard's cigarettes.

Other documents submitted established that Lorillard engaged in a nationwide marketing campaign, including advertisements in magazines with national circulations, and on network television. The advertising focused specifically on Kent's then new, exclusive, and supposedly highly-efficient, yet dust-free filter. Lorillard unveiled its new product at a luncheon in New York. It disclosed at that time that Lorillard had developed the new filter in close cooperation with H&V, and that H&V's technical director had worked on the filter material with the Naval Research Laboratory during World War II. Further, Lorillard disclosed that an affiliate of H&V would supply the filter material for Kent cigarettes.

H&V's affiant, Paul Walker, testified in a prior deposition that at the time the Agreement was signed in 1952, H&V was fully aware that Lorillard intended to put the filter media into Kent cigarettes, to advertise the product with special emphasis on the filter, and to sell the cigarettes to the public. During the life of the Agreement, H&V placed one of its researchers full time with Lorillard. An internal H&V memorandum shows that H&V worked with Lorillard to correct problems with the "draw" of the filtered cigarettes. H&V recognized that certain changes would be necessary if Kent were " . . . to be any more than a small seller . . .". Mr. Walker also testified that when H&V made decisions regarding design of the filter media, jointly with

Lorillard, it took into consideration Lorillard's wishes ". . . in connection with customer acceptance of the product."

The parties' joint efforts helped Lorillard to sell and distribute vast quantities of Kent cigarettes in Maryland, where Stanley Lesnick bought them. In all, Lorillard sold to consumers nationwide more than ten billion (10,000,000,000) cigarettes containing H&V's filter media. Under Specialties' Agreement with Lorillard, Specialties received payment based on a multiplier of its costs for every filter media sold to Lorillard. H&V derived substantial revenue from the sale of Kent cigarettes in Maryland.

On January 5, 1993, the Honorable Frank A. Kaufman held a non-evidentiary hearing on the dismissal motion. On April 13, 1993, Judge Kaufman issued a Memorandum and Order, granting H&V's motion to dismiss. Thereafter, Mrs. Lesnick moved Judge Kaufman to issue an order entering judgment under F.R.Civ.P. 54(b). Neither defendant opposed the motion. On June 18, 1993, Judge Kaufman granted the motion, found that there was no just reason for delay, entered final judgment in favor of H&V, and stayed the litigation pending the outcome of the appeal. By Opinion dated September 19, 1994, the United States Court of Appeals for the Fourth Circuit affirmed. On October 18, 1994, the court denied Mrs. Lesnick's Petition for Rehearing with Suggestion for Rehearing In Banc.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Allowance of the writ of certiorari is imperative to resolve a conflict in the Circuit Courts of Appeals and to rectify the judgment of the court below, which imposes an intolerable restriction on a state's ability to exercise jurisdiction over a nonresident corporation. Both the Circuit Court of Appeals for the Fourth Circuit and the District Court for the District of Maryland recognized that the defendant herein, Hollingsworth & Vose Co. ("H&V"), was intimately involved in the design and development of a cigarette filter. Likewise, both courts found that H&V derived substantial financial benefit from the cigarette manufacturer's nationwide sales of the cigarettes into which

H&V's product, the filter media, was incorporated. Nevertheless, the courts believed that because H&V did not have any direct contact with Maryland, exercise of personal jurisdiction over H&V would not comport with due process. Because cases from other Circuit Courts of Appeals have held, and justice and logic demand, that a defendant's active involvement in the nationwide distribution of a product that causes injury in the forum state be a constitutionally sufficient basis upon which to exercise jurisdiction in the forum, grant of certiorari is required.

I. THE OPINION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH OPINIONS FROM OTHER CIRCUIT COURTS

The Circuit Court of Appeals held that, although H&V engaged in "additional conduct" beyond merely placing its filter media in the stream of commerce, jurisdiction over H&V in Maryland would not comport with due process because H&V engaged in no conduct specifically directed toward Maryland. The court failed to discuss persuasive authority from other Circuit Courts of Appeals that actions taken by a defendant that may be said to constitute purposeful availment of the markets in all states establishes jurisdiction in each state. In *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir.), *cert. denied*, 114 S.Ct. 304 (1993), the court rejected a defendant's argument ". . . that it has done nothing in particular to purposefully avail itself of the Kentucky market as distinguished from any other state in the union." 993 F.2d at 544. The court held that a drug manufacturer's decision to have its drug marketed in all fifty states, even though it did not itself set up a distribution system, established jurisdiction in each state. Similarly, in *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir.), *cert. denied*, 113 S.Ct. 2334 (1993), the court held that evidence that an automobile manufacturer modified its cars for the entire American market was sufficient to establish jurisdiction over it in a state in which another entity distributed the cars.

Here, the opinion of the court below directly conflicts with these holdings. The court recognized that the written submissions showed that H&V and the cigarette manufacturer, Lorillard, cooperated closely in bringing the asbestos-containing cigarette to market and in attempting to make the cigarette successful. The court found explicitly that H&V's actions pursuant to the contract between H&V and Lorillard represented "additional conduct" of the type set forth in the plurality opinion in *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County,* 480 U.S. 102 (1987). H&V knew of and benefitted from Lorillard's national sales of the cigarettes, including those in Maryland. Yet, the court rejected a Maryland court's ability to exercise jurisdiction, holding that proof of action directed toward Maryland was necessary. This is a requirement explicitly rejected in the above-cited cases. This conflict requires review and resolution by this Court.

II. THE HOLDING OF THE CIRCUIT COURT OF APPEALS CONSTITUTES A GROSS DEPARTURE FROM THE STANDARDS GOVERNING THE CONSTITUTIONAL EXERCISE OF PERSONAL JURISDICTION

Grant of the writ of certiorari is also warranted because the holding of the court below grossly departs from the last fifty years of case law in the area of personal jurisdiction. At least since the decision in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), this Court has analyzed the problem of the constitutionality of a state's exercise of personal jurisdiction over a nonresident defendant in terms of whether the defendant had "minimum contacts" with the forum state. In cases decided since *International Shoe,* the Court has wrestled with varying ways to formulate a test that will allow an accurate assessment of whether any particular defendant has sufficient contacts with the forum to permit the exercise of jurisdiction. In the most common expression of the test, this Court has held that the "minimum contacts" test is satisfied if the defendant has "purposefully availed" itself of the privilege of doing business in the forum state. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980).

There has been some disagreement about the level of conduct that will be required before a court can conclude that a nonresident corporation has sufficiently acted with a purpose to avail itself of a forum's market. The most recent analysis of the issues is contained in *Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County, supra.* There, a plurality of this Court set forth a test requiring a defendant to have engaged in some "additional conduct" indicating an intent to serve the forum market over and above the mere placement of a product in the stream of commerce. The court below here, while finding that H&V had engaged in one of the examples of "additional conduct" set forth in *Asahi,* namely the designing of the product for national distribution, held that due process requires that H&V have engaged in conduct directed to serve the Maryland market specifically. This holding is far beyond any construction of the due process clause made by this Court or any other court.

The lower court opinion, at bottom, erects a requirement that a defendant purposefully avail itself *directly* of the market in the forum state. In so doing, the court abandons the well-established principle that a state may properly exercise jurisdiction over a nonresident defendant who serves the forum market indirectly. It fails to adhere to that principle even though this defendant's intent to serve the market in the forum is crystal clear. A principle of law requiring personal jurisdiction to be founded on direct contact only with the market in the forum state runs roughshod over this Court's jurisprudence and would wreak havoc with a state's ability to offer the opportunity of full relief from injury to its citizens.

This Court noted in *World-Wide Volkswagen Corp. v. Woodson, supra,* that jurisdiction may be founded on a party's efforts to serve **directly or indirectly** the market for its product in other states. 444 U.S. at 297. While the Court was careful to rule that jurisdiction cannot be based on the unilateral activities of third persons, that consideration is nonexistent here, as Mr. Lesnick purchased the cigarettes in Maryland as a result of H&V's joint efforts with Lorillard to bring the asbestos-containing filter cigarette to market in each state,

including Maryland. Similarly, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), this Court noted that the contacts need only "proximately result" from actions by the defendant, and emphasized that the defendant's territorial presence in the forum is not required. These formulations are in direct contrast to the lower court's apparent requirement of direct action by the defendant to inject itself into the forum market.

Further, it is plain that the plurality opinion in *Asahi* would not hold that jurisdiction must be based on a direct connection with the forum. To the contrary, the principle drawn from the *Asahi* plurality continues to be that the evidence must show that the defendant acted with an intent or purpose to serve the market in the forum state, not that the defendant initiated contact with the forum. 480 U.S. at 112. The design of a product in anticipation of sales in the forum, which is proven beyond doubt in the instant case, establishes the necessary purpose to serve the forum state under the test of the *Asahi* plurality.

Indeed, the *Asahi* plurality cites with approval *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta*, 553 F.Supp. 328 (E.D.Pa. 1982), as an example of jurisdiction based on a party's design of a product in anticipation of sales in the forum state. *Asahi*, 480 U.S. at 113. In *Rockwell International*, a foreign corporation that designed and manufactured ball bearing assemblies sought dismissal of a suit based on the malfunction of one of its assemblies that had been installed in a helicopter. The defendant worked closely with the helicopter manufacturer in custom designing a ball bearing assembly for use in the helicopter. The defendant sought dismissal, claiming that because the sales of its component part were confined to the foreign market, it had not established minimum contacts with the forum. In denying the motion to dismiss, the court noted that the defendant's decision to enter the international transportation market and its work to custom make a part that would be used exclusively in the seller's helicopters established that the defendant had purposefully availed itself of the forum market. The court observed that the critical involvement of the defendant for "minimum contacts" purposes occurred some steps prior to distribution of the finished product. 553 F.Supp. at 331.

It is a similar early involvement of H&V here that establishes H&V's intent to take advantage of the Maryland market, an involvement to which the court below attaches insufficient weight.

The court below recognized that H&V consciously decided to exploit the national cigarette market by designing a filter jointly with Lorillard, exclusively for integration into Lorillard's cigarettes. The court's holding, that this conduct by H&V does not demonstrate sufficient intent to purposefully avail itself of the forum market, has added an intolerable obstacle to a state's exercise of jurisdiction over a nonresident manufacturer. The test set forth by the lower court is not whether the defendant acted with a purpose to avail itself of the privilege of doing business is the forum, but rather, it is whether the defendant consciously directed conduct toward the forum state.

The result of that holding is to erode a state's ability to afford its citizens the opportunity of obtaining complete compensation and relief from torts committed upon them. The situation involved herein is quite common. The plaintiff has sued the manufacturer of a finished product and the manufacturer of one of the product's component parts because the component part was defective. The part caused injury to a consumer who bought and used the finished product in the forum state. The finished product was demonstrably the result of joint, cooperative efforts by the two manufacturers, and the component manufacturer had a direct interest in the sales of the finished product. The finished product was sold in Maryland by the millions.

Certainly, a consumer has every expectation that he may bring suit against each of these two tortfeasors in the forum of his residence. He must be able to attempt to hold them jointly liable, just as they jointly brought the offending product to market. Likewise, a state must be able to protect its citizens by permitting them to seek full redress for harms done to them by products knowingly and deliberately marketed in the forum state. Yet, the court below held that a tort victim cannot fully vindicate his rights in his forum of residence. This result is contrary to all reason and justice. Indeed, it runs afoul of this Court's admonition that the due process clause may not be used

". . . as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King v. Rudzewicz*, 471 U.S. at 474.

Further, the decision may make it even more difficult for tort victims to obtain redress for wrongs, as any manufacturer could insulate itself from being sued anywhere but its place of residence simply by using an independent national distributor to market its products. *See Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d at 544. Grant of the writ of certiorari is imperative here so that this Court can establish that a manufacturer of an injurious product is amenable to suit in any forum in which injury occurred when the manufacturer purposefully availed itself of the privilege of doing business in every state in the nation.

CONCLUSION

For the foregoing reasons, Petitioner, Beverly Lesnick, respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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